Kertih Port Sdn Bhd v Pemunya Kapal 'Shema'

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM NO D11–(D3)–27–30 OF 2001
NALLINI PATHMANATHAN J
7 JUNE 2010

Civil Procedure — Admiralty — Action in rem — Order deeming specified expenses and costs as sheriff's expenses — Whether proper — Whether SAR erred in assessment of expenses and costs

Civil Procedure — Appeal — Fact, finding of — Appeal to judge from SAR's findings of fact — Whether judge ought not lightly interfere with SAR's findings

Shipping and Navigation — Admiralty — Action in rem — Order deeming specified expenses and costs as sheriff's expenses — Whether proper — Whether SAR erred in assessment of expenses and costs

The High Court set aside the plaintiff's writ in rem, warrant of arrest, service of the writ and a unilateral notice of discontinuance ('the setting aside order'). The setting aside order also provided that all expenses, costs and charges expended by the defendant in connection with the preservation and maintenance of the vessel 'Shema', wages and allowances of the crew and other ancillary expenses incurred while the ship was under arrest be deemed to be sheriff's expenses and ascertained, either by way of consent between the parties or after taxation and assessment by the senior assistant registrar ('SAR') and paid by the plaintiff to the defendant forthwith. The SAR proceeded to tax and assess costs and awarded the defendant a sum of RM281,843.42 and interest thereon. The plaintiff appealed against the SAR's decision and award. The plaintiff contended that the setting aside order could not enlarge the category of expenses that were normally within the purview of the sheriff's expenses. Therefore, argued the plaintiff, the order should be read in a limited fashion to strictly allow only those expenses normally arising as sheriff's expenses and which were incurred entirely as a consequence of the arrest.

Held, dismissing the appeal with costs:

(1) The terms of the setting aside order were unambiguous. It identified categories and deemed specified expenses and costs as sheriff's costs and further conferred priority to the defendant against other potential claimants. The order did not provide that only sheriff's expenses were recoverable (see para 5).

(2) Order 70 r 6 of the Rules of the High Court 1980 requires that prior to property under arrest being released, the party at whose instance such arrest was issued, must in accordance with the directions of the sheriff, either pay the costs, charges and expenses due in connection with the care and custody of the property while under arrest or give a written undertaking to do so. In the instant case, no such undertaking was furnished by the plaintiff. Neither was any monies paid into court or lodged with the sheriff (see para 9).

(3) Being an appeal, the High Court judge was bound not to interfere lightly with the findings of fact of the SAR who had the opportunity and advantage of seeing and reviewing first hand the content and credibility of the witnesses (see para 12).

(4) There was no reason to interfere with the finding of fact on the absence of the crew and consequently no reason to doubt the quantum awarded in terms of crew wages and allowances. Further, the SAR did not err in allowing: (a) the sum representing the management fee, in accordance with the terms of the setting aside order; (b) the claim for repair and restoration work to the vessel — the evidence showed that the repairs were necessitated by the arrest of the ship and were necessary for the preservation and care of the vessel, so as to ensure that it remained seaworthy; and (c) the claim for pro-rated insurance premiums for hull and machinery cover during the time of the vessel's arrest (see paras 13(a)–(c) & 15).

(5) The SAR did not err in her findings of fact or law in arriving at her conclusion to award the plaintiff the sum of RM281,843.42 (see para 25).

[Bahasa Malaysia summary

Mahkamah Tinggi mengetepikan writ in rem plaintif, waran tangkap, serahan writ dan notis penamatan satu pihak ('perintah pengetepian'). Perintah pengetepian juga memperuntukkan bahawa kesemua perbelanjaan, kos dan caj yang dibelanjakan oleh defendan berhubungan pemeliharaan dan pengekalan kapal 'Shema', gaji dan elaun anak kapal dan perbelanjaan sampingan yang lain ditanggung semasa kapal di bawah tahanan dianggap sebagai perbelanjaan sherif dan menentukan, sama ada cara keizinan di antara pihak-pihak atau selepas pencukaian oleh penolong kanan pendaftar ('PKP') dan dibayar oleh plaintif kepada defendan serta-merta. PKP meneruskan dengan pencukaian dan menaksir kos dan mengaward defendan sejumlah RM281,843.42 dan faedah. Plaintif merayu terhadap keputusan dan award PKP. Plaintif berhujah bahawa perintah pengetepian tersebut tidak boleh meluaskan kategori perbelanjaan yang biasanya dalam skop perbelanjaan sherif. Oleh itu, plaintif berhujah, perintah tersebut patut dibaca di dalam cara terbatas untuk membenarkan secara ketat hanya perbelanjaan yang biasanya berbangkit

sebagai perbelanjaan sherif dan yang mana ditanggung secara keseluruhannya akibat tangkapan tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Terma perintah pengetepian tersebut adalah jelas. Ia mengenal pasti kategori-kategori dan perbelanjaan dan kos spesifik sebagai kos sherif dan selanjutnya memberikan keutamaan kepada defendan terhadap penuntut berpontensi yang lain. Perintah tersebut tidak memperuntukkan bahawa hanya perbelanjaan sherif sahaja yang boleh didapatkan kembali (lihat perenggan 5).

(2) Aturan 70 k 6 Kaedah-Kaedah Mahkamah Tinggi 1980 memerlukan bahawa sebelum harta yang di bawah tahanan tersebut dilepaskan, pihak yang mana tangkapan tersebut dikeluarkan, mesti mengikut arahan-arahan sherif, sama ada pihak membayar kos, caj dan perbelanjaan yang kena dibayar berhubungan dengan pemeliharaan dan penjagaan harta tersebut semasa di bawah tahanan atau memberi akujanji bertulis untuk berbuat sedemikian. Dalam kes ini, tidak terdapat akujanji sedemikian dikemukakan oleh plaintif. Begitu juga tidak terdapat apa-apa wang dibayar kepada mahkamah atau diserah simpan dengan sherif (lihat perenggan 9).

(3) Sebagai rayuan, hakim Mahkamah Tinggi tidak terikat untuk campur tangan dengan melulu dapatan fakta PKP yang mempunyai peluang dan kelebihan melihat dan menyemak isi dan kredibiliti saksi-saksi terlebih dahulu (lihat perenggan 12).

(4) Tidak terdapat alasan untuk campur tangan dapatan fakta atas ketidakhadiran anak kapal dan oleh itu tidak ada alasan untuk meragui kuantum yang diawardkan dari segi gaji anak kapal dan elaun. Selanjutnya, PKP tidak tersilap dalam membenarkan: (i) jumlah mewakili fi pengurusan, mengikut terma-terma perintah pengetepian tersebut; (ii) tuntutan untuk pembaikan dan kerja membaik pulih terhadap kapal tersebut keterangan menunjukkan bahawa pembaikan diperlukan akibat penahanan kapal tersebut dan perlu untuk pemeliharaan dan penjagaan kapal tersebut, untuk memastikan yang ia kekal layak belayar; (iii) tuntutan untuk premium insurans dipuratakan untuk perlindungan badan kapal dan jentera semasa penahanan kapal tersebut (lihat perenggan 13(a)–(c) & 15).

(5) PKP tidak tersilap di dalam dapatan fakta atau undang-undang dalam mencapai kesimpulannya untuk mengawardkan plaintif jumlah RM281,843.42 tersebut (lihat perenggan 25).]

Notes

For cases on action in rem, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 229–236.

For cases on admiralty generally, see 11 Mallal's Digest (4th Ed, 2008 Reissue) paras 1154–1211.
For cases on fact, finding of, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 898–1004.

Cases referred to

Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd [2006] 3 MLJ 131; [2006] 2 CLJ 337, CA (refd)
Shravan, The [1999] 4 SLR 197, HC (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1993] 1 MLJ 113; [1993] 2 CLJ 146, SC (refd)
Tay Kheng Hong v Heap Moh Steamship Co Ltd [1964] MLJ 87; [1964] 1 LNS 202, HC (refd)

Legislation referred to

Rules of the High Court 1980 O 70 rr 6, 11

Liew Teck Huat (Genevieve Tan with him) (TH Liew & Partners) for the plaintiff.
Mathew Kurien (Sativale Mathew Arun with him) for the defendant.

Nallini Pathmanathan J:

[1] This is an appeal by the plaintiff against the decision of the senior assistant registrar dated 11 August 2009 assessing and taxing the defendant's claim for costs incurred in the arrest of its vessel, the 'Shema' over a period of 104 days. The assessment was made by the learned registrar pursuant to an order of court dated 22 March 2006 granted by Mr Justice Wahab Patail (now JCA) when he set aside the plaintiff's writ in rem, warrant of arrest, service against the said vessel and the unilateral notice of discontinuance filed by the plaintiff ('the setting aside order').

[2] After hearing the parties in full on the issue of the assessment and taxation of costs, the learned registrar awarded a sum of RM281,843.42 to the defendant together with interest at the rate of 8%pa on the said sum from the date of the order until full settlement. In short the assessment and taxation of such costs was premised on the setting aside order, the salient portion of which, for the purposes of this appeal, reads as follows:

> ... 4. Perbelanjaan-perbelanjaan, kos and caj-caj Defendan yang di belanjakan oleh Defendan berkaitan dengan pemeliharaan dan penjagaan kapal 'Shema', gaji dan upah anak-anak kapal dan lain-lain perbelanjaan sampingannya semasa kapal tersebut di bawah tahanan dianggap sebagai perbelanjaan Syerif ditentukan sama ada secara persetujuan pihak-pihak di sini atau selepas taksiran atau penetapan oleh Penolong Kanan Pendaftar dan di bayar oleh Plaintif kepada Defendan dengan serta merta...

[3] In effect the terms of the order provide that all expenses, costs and charges expended by the defendant in connection with the preservation and maintenance of the vessel 'Shema', wages and allowances of the crew and other ancillary expenses incurred while the ship was under arrest are deemed to be sheriff's expenses and ascertained, albeit by way of consent between the parties here, or after taxation and assessment by the senior assistant registrar and paid by the plaintiff to the defendant forthwith.

[4] The setting aside order is clear in that it stipulates the categories of expenses that are to be treated as if they were sheriff's expenses, namely preservation and maintenance costs, wages and allowances for the crew as well as all other monies expended by the defendant while the vessel was under arrest. The plaintiff who is the appellant in this appeal contends that the order does not serve to enlarge the category of expenses that normally fall within the purview of sheriff's expenses, and that accordingly the order should be read in a limited fashion to strictly allow only those expenses which would normally arise as sheriff's expenses and which were incurred entirely as a consequence of the arrest. The defendant on the other hand maintains that the deeming provision as 'sheriff's expenses' in the setting aside order is only for the of ranking in priority of payment out of expenses or costs to the defendant against all other claimants in the vessel and not in identifying those expenses, charges and costs as sheriff's expenses in the instant case.

[5] It appears to this court that the terms of the setting aside order, which are unambiguous: serve to identify, categories and deem specified expenses and costs as sheriff's costs and additionally confer priority to the defendant against other potential claimants. The order does not provide that only sheriff's expenses are recoverable.

[6] The basis for the terms of the setting aside order stem from the background facts of this case. On 10 November 2001 the plaintiff commenced this in rem admiralty action against the vessel 'Shema' which was owned by the defendants. The vessel was arrested on the same date and the plaintiff's sought security for their claim in the sum of RM2,384,000 to secure the release of the vessel. The defendant entered a conditional appearance and applied to court to set aside the writ in rem and the warrant of arrest as well as service thereof and sought damages for wrongful arrest. Additionally the defendant sought an order for the sheriff to maintain the vessel pending the hearing of its application.

[7] The plaintiff furnished security of RM15,000 to the sheriff on application for the warrant of arrest. It did not furnish any form of undertaking relating to costs and expenses incurred during the term of arrest of the vessel. There was no application made by the sheriff for directions with regards to the

vessel under arrest, commonly referred to as an 'omnibus application' pursuant to O 70 r 11 of the Rules of the High Court 1980. Neither did the plaintiff notwithstanding that it was the arresting party, and despite the defendant exhorting the plaintiff to do so. The defendant eventually made such an application (although it was not heard). Pending the disposal of the application for directions, all expenses incurred in the course of the arrest of the vessel, including the payment of crews wages, the costs of maintenance and repair of the vessel which lay idle, and all ancillary costs were borne by the defendant. There were no expenses incurred by the sheriff of the High Court on behalf of the plaintiff as 'sheriff's expenses' in the arrest and maintenance of the vessel and crew. The plaintiff did supply victuals and bunkers to the vessel on one or two occasions.

[8] After the vessel had been under arrest for 104 days, the plaintiff unilaterally filed a notice of discontinuance of the action and procured the release of the vessel from arrest. Such unilateral discontinuance, if allowed, would have left the defendant with no reparation in particular as to the costs of the action and/or recovery of all unnecessary and wasted expense incurred during the 104 days. It was on this premise that the defendant sought to set aside the unilateral notice of discontinuance and claimed that the plaintiff meet all costs and expenses so incurred.

[9] In any event O 70 r 6 requires that prior to property under arrest being released, the party at whose instance such arrest was issued, must in accordance with the directions of the sheriff, either pay the costs, charges and expenses due in connection with the care and custody of the property while under arrest or give a written undertaking to do so. No such undertaking was furnished by the plaintiff. Neither were any monies paid into court or lodged with the sheriff.

[10] At the hearing of the assessment of costs and expenses before the registrar, the defendant adduced evidence of expenditure incurred through its one witness, Mohd Mukhtar bin Ab Karim, DW1, its director and chief executive officer. For the plaintiff, one Abdul Rahman bin Adnan, PW1, the operations executive of MISC Agencies Sdn Bhd gave evidence. The total amount claimed in respect of the expenses and charges incurred by the defendant amounted to RM342,190.18. After hearing the witnesses and oral submissions the learned registrar allowed the sum of RM281,843.42 together with interest and costs in favour of the defendant as follows:

No	Date	Invoice No	Expenses incurred for the Month	Amount (RM)
1	5–12–01	AM/CSH/20010010	November 2001	33,636.75
2	4–1–01	AM/CSH/20010011	December 2001	48,157.50
3	6–2–02	AM/CSH/20010012	January 2002	13,692.61

4	6–3–02	AM/CSH/20010013	February 2002	10,000
5	30–3–02	AM/CSH/20010013	February 2002	154,310.40
6		Insurance premiums	10–11–2001 till 21–02–2002	22,046.16
		TOTAL		281,843.42

[11] In effect the learned registrar allowed the plaintiff's claim in full save for wages and crew allowance from 4 January 2001 until the release of the vessel, as she made a finding of fact that there were no crew on board the vessel. The defendant's claim for repair and preservation costs as well as pro-rated insurance premiums was allowed in full.

[12] I am mindful that as this is an appeal, I am bound not to interfere lightly with the findings of fact of the learned registrar, who had the opportunity and advantage of seeing and reviewing first hand the content and credibility of the witnesses (see *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1993] 1 MLJ 113; [1993] 2 CLJ 146 citing the judgment of Lord Guest in *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87; [1964] 1 LNS 202; also *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd* [2006] 3 MLJ 131; [2006] 2 CLJ 337).

[13] The evidence led at the hearing of the assessment of damages is set out in full in the notes of proceedings and I do not propose to summarise the same here. For the purposes of this appeal three issues arise for consideration. The plaintiff contends that the order for payment of the said sum of RM281,843.42 is flawed and that the learned registrar erred in awarding the said sum by reason of the following matters:

(a) With regards to the issue of wages and salaries of the crew, the plaintiff contends that there was an absence of crew on board the vessel with effect from January 2002. Further it is contended that the management fee of RM10,000 per month levied by the ship's manager, Armada, ought not to be paid as a cost or expense as the said sum is a recurring monthly expense paid for the management and operation of the vessel as an ongoing transaction whether or not there was an arrest. As such it is contended that it is not a charge or expense incurred as a result of the ship being arrested.

(b) The plaintiff challenges the invoice for the repair and restoration work on the vessel on the grounds that there is no evidence before this court that the vessel had sustained damage or disrepair during the period of the arrest to the extent that substantial repair works were necessary. Neither, it is contended, is there evidence that such repair works were in fact

carried out in that no source documents were produced at the hearing of the assessment of damages. It is also contended that the claim for repairs is in the nature of special damages which must therefore be sufficiently proved.

(c) The insurance premium for hull and machinery cover, like the management fee in (a) is an industry requirement and was required whether or not there was an arrest. Accordingly it cannot be said to be an expense incurred as a consequence of the arrest and ought not to have been allowed.

[14] These issues will be considered in turn.

The management fee and absence of crew on board the vessel 'Shema'

[15] Dealing first with the latter issue, the learned registrar made a finding of fact that there were no further crew on board the vessel with effect from 4 January 2002 and therefore disallowed crew wages and allowances after that date until release. There is no reason to interfere with that finding of fact and it therefore follows that there is no reason to doubt the quantum awarded in terms of crew wages and allowances. A perusal of the notes of evidence will show that the plaintiff challenged the contention of the defendant that crew was present throughout on the ship, maintaining that no crew were present with effect from 4 January 2001. The court made a finding of fact to this effect, namely that there were no crew on board the vessel as of 4 January 2002. The defendant filed no cross-appeal in this matter in relation to such finding. Accordingly it is not for this court to interfere.

[16] In so far as the management fee is concerned. DW1 was only asked whether invoices would be issued by the management company whether or not there was an arrest. There was no direct challenge to the incurring of the management fee. Therefore the issue that arises for consideration is this: Can it be said that because the management fee of RM10,000 is incurred whether or not an arrest had occurred it is not an expense incurred as a consequence of the arrest and is therefore not claimable. In this context it is necessary to consider the terms of the setting aside order. It is evident from the terms of that order that all costs, expenses and charges incurred in the preservation and maintenance of the vessel including the crew's wages and all ancillary costs incurred by the defendant are to be paid by the plaintiff to the defendant. It is not in dispute that the defendant had entered into a ship management contract with one Armada Marine Services Sdn Bhd as of October 2001 for the maintenance and operation of the vessel. A monthly service charge of RM10,000 accrued. It is also not in dispute that the defendant paid that sum. Accordingly it is not in dispute that the said sum of RM10,000 a month for the tenure of the arrest was incurred or expended by the defendant. The fact that

the defendant would have incurred the same payment if the ship had been operational and not under arrest, does not detract from the fact that it was a real expense incurred by the defendant during the period of arrest. The setting aside order does not provide that only expenses directly attributable to the arrest of the ship or arising as a consequence of the arrest of the ship only, are payable by the plaintiff to the defendant. Instead it provides expressly that all costs and expenses reasonably incurred in the preservation and care of the vessel together with crew wages and allowances as well as ancillary expenses borne by the defendant are to be paid by the plaintiff to the defendant. It is apparent that the management fee was so incurred for the maintenance of the vessel or as an ancillary expense. I therefore conclude that the learned registrar did not in allowing the said sum, in accordance with the terms of the setting aside order.

The repair and restoration work on the vessel amounting to RM154,310.40

[17] As stated above, the contention here is that there is no evidence showing that the vessel had sustained damages or disrepair during the period of arrest so as to warrant such substantial repair works. The plaintiff, in its submissions, also challenges the scant evidence produced by the defendant namely a quotation which does not set out the nature of the defects for which the repairs were required. Neither was a survey conducted. No receipts are produced in support of the quotation to show that the items stated there were actually incurred. In other words, no source documents showing for example that engineers had flown in and carried out the works was produced. Accordingly it is suggested that the quotation was tailored for the purposes of the hearing. Like special damages it is contended that the onus remains on the defendant to prove this portion of its claim in detail (see *The Shravan* [1999] 4 SLR 197).

[18] The defendant contends that the repairs were necessitated by the fact that the vessel lay idle for some considerable time during the arrest. It also denies on the evidence of DW1 who testified that he had made this payment for repairs, thus deeming it a necessary expense that was incurred for the purposes of preservation and care of the vessel.

[19] An examination of the evidence on this point discloses that DW1 testified that while under arrest the vessel was not mobilised or operational. The engine and other machinery of the vessel was not functioning fully and completely. The body of the vessel had to be examined carefully to ascertain whether there was any damage. The defendant maintained that it had to carry out a full examination to ascertain that the vessel was seaworthy as a consequence of its long arrest. DW1 further testified that it was a term of the mortgage with the vessel's mortgagees, Bank Industri dan Teknologi Malaysia Sdn Bhd that the vessel had to be maintained in seaworthy condition at all times. Accordingly he maintained that the repairs were necessary. He went on

to explain how the defendant procured the quotation from Armada Marine Services Sdn Bhd who estimated the cost after a thorough examination of the vessel. DW1 also stated that but for the arrest the repair works would not have been necessary and that ordinary maintenance would have sufficed. Before work could commence however, the plaintiff unilaterally released the ship and consequently the actual work was carried out after release of the ship. Finally he testified that the said invoice for the repairs had been paid by the defendant in full.

[20] In the course of cross-examination, DW1 was asked whether he had any documents to support the fees levied for the engineer who had come out of Singapore to carry out the repairs. He replied that the sum stipulated in the invoice was in accordance with the quotation supplied and agreed. In other words, he had no other supporting documents.

[21] Apart from this, DW1 was not challenged on his evidence that the repair works were caused or necessitated by reason of the prolonged term of arrest. As such it follows that on the evidence before the court at the hearing of the assessment the evidence showed that the repairs were necessitated by the arrest and were necessary for the preservation and care of the vessel, so as to ensure that it remained seaworthy. It was not put to DW1 that his quotation and invoice were tailored for the purposes of the assessment of damages and so this contention is not tenable. It therefore appears to this court that the learned registrar made no or in principle or in relation to the evidence in concluding that this head of the defendant's claim ought to be allowed too.

[22] Finally the fact that the repairs were effected after the arrest does not detract from the fact that they were necessary by reason of the arrest. Moreover these repairs were necessary and appropriate to preserve the ship, her machinery and equipment.

[23] Accordingly the repairs amount to expenses necessarily incurred by the defendant in maintaining and preserving the vessel as a consequence of the arrest and are therefore claimable.

The claim for pro-rated insurance premium for hull and machinery cover during the term of the arrest

[24] As summarised above, the contention here is that this insurance would have been taken out in any event whether or not the vessel was arrested as it is an industry requirement. Accordingly it is contended that there is no basis for claiming under this head as an expense incurred as a consequence of the arrest. The reasoning here is similar as that for the management fee above, in that there too, it was contended that the payment of the fee did not arise by reason

of the arrest and was payable whether or not the arrest had occurred. In like vein, as I have stated above, the premise of payment of costs and expenses is based on the setting aside order. That order envisages that expenses incurred by the defendant in the maintenance and preservation of the vessel are claimable. It is not in dispute that no port risk insurance was taken out by the sheriff or the plaintiff notwithstanding that the defendant asked them to do so. If such insurance had been taken the defendant need not have taken or paid P & I insurance for the term of the arrest pursuant to an omnibus order. However as this was not done, insurance premium continued to be paid. It was an expense incurred by the defendant during the course of the arrest and necessary for the preservation and care of the vessel particularly as no port risk insurance was taken out. Again the fact that hull and machinery cover has to be routinely taken out whether or not there was an arrest does not mean that the defendant did not incur this expense for the preservation of this vessel during the term of the arrest. As such the registrar did not err in allowing this head of the claim either.

[25] I am satisfied that the learned registrar did not err in her findings of fact or in law in arriving at her conclusion to award the plaintiff the sum of RM281,843.42. Accordingly this appeal is dismissed with costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon